IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11664 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SALIMMUDDIN YASINBAIG MIRZA MSC LLM - Petitioner(s)

Versus

DISTRICT MAGISTRATE & 2 - Respondent(s)

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Appearance :

MS SANGITA PAHWA for M/S THAKKAR ASSOC. for Petitioner No(s).: 1.
MR DA DESAI, ASST.GOVT PLEADER for Respondent No(s).: 1, 2,3.

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CORAM :HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date : 29/06/2005

ORAL JUDGMENT

1. By filing this petition, the petitioner has challenged the order

passed by Legal Department, State of Gujarat, dated 3.3.2004 and 21.6.2004. The aforesaid orders are finding place at Annexure 'M' Collectively, at pages 50 and 51 of the compilation. By the aforesaid orders, the petitioner was informed that he is not entitled to lien on the post of Assistant Public Prosecutor, and accordingly, he was not given charge of the aforesaid post of Assistant Public Prosecutor.

2. The petitioner was appointed as Assistant Public Prosecutor initially for a period of two years on probation. [The petitioner has not produced a copy of the order appointing him as Assistant Public Prosecutor]. However, the petitioner has produced a copy of the order dated 25.1.2001 wherefrom it appears that the petitioner had resumed his charge on the said post on 7.4.1997. The said order further states that on satisfactory completion of the probation period, he was continued as Assistant Public Prosecutor on a long term basis.

3. As per the averments made in the petition, by order dated 28.6.2000, the petitioner was appointed as Civil Judge [JD] and JMFC on probation initially for a period of two years, which was further extended for a period of one year. Ultimately, the services of the petitioner were terminated by notification of the Legal Department dated 8.12.2003, and the petitioner was relieved from the post of Civil Judge [JD] and JMFC w.e.f. 10.12.2003. In paragraph 2.6 of the petition, the petitioner has averred that the petitioner made an application to the Legal Department on 11.12.2003 requesting to appoint the petitioner on the post of Assistant Public Prosecutor as his lien on the said post is continued in view of Circular dated 6.12.1997. In paragraph 2.8, the petitioner further averred that by letter dated 15.12.2003, the petitioner requested the

Collector to appoint him as Assistant Public Prosecutor. In paragraph 2.9 of the petition, the petitioner has averred that by order dated 15.12.2003, the respondent No.1 gave him charge of 5th Joint Court and Juvenile Court at Surat. In paragraph 2.10, it is averred by the petitioner that by order dated 20.12.2003, the petitioner was informed that in pursuance of the written representation of Shri H.D. Virani, who was earlier holding the charge of 5th Joint Court and Juvenile Court, the petitioner cannot be given charge of Assistant Public Prosecutor till further instructions are received from the Legal Department. Ultimately, after calling for some explanation from the petitioner, as stated in paragraph 2.16 of the petition, by letter dated 21.6.2004, the petitioner was informed that circular dated 6.12.1997 is not applicable to the petitioner and therefore he cannot be reinstated on the post of Assistant Public Prosecutor. Along with the said letter a copy of letter dated 3.3.2004 was also forwarded which also states that the resolution dated 6.12.1997 is not applicable to the petitioner and therefore, letter dated 15.12.2003 by which the petitioner was given charge of Assistant Public Prosecutor is cancelled. Being aggrieved by the said orders, the petitioner has filed this petition.

4. Heard learned advocate Ms. Sangita Pahwa and Mr. D.A. Desai, learned Assistant Public Prosecutor.

5. Ms. Pahwa submitted that the petitioner was promoted from the post of Assistant Public Prosecutor to the post of Civil Judge [JD] and JMFC and that as he is not confirmed on the said post, his lien to the original post of Assistant Public Prosecutor continues, and, therefore, he is entitled to continue on his original post of Assistant Public Prosecutor.

6. Before joining the duty as Civil Judge [JD] and JMFC, the petitioner wrote a letter to the District Collector, which is finding place at page 26 of the compilation, requesting the Collector to relieve him from the post of Assistant Public Prosecutor so that he can resume his duty as Civil Judge [JD] and JMFC. The petitioner was thereafter relieved. After the services of the petitioner as Civil Judge [JD] and JMFC was terminated, he wrote a letter dated 11.12.2003 to the Legal Secretary interalia stating that his lien on the post of Assistant Public Prosecutor continues, and, therefore, he is entitled to continue as such on the said post. The petitioner also wrote a letter to the Collector on 15.12.2003, which is at page 38 in the compilation. The Additional District Magistrate, by order dated 15.12.2003, gave posting order to the petitioner as Assistant Public Prosecutor

7. At this stage, it would be relevant to refer to the affidavit filed by Mr. H.K. Shah, Under Secretary, Legal Department. In paragraph 4, he has stated that the petitioner was relieved from the post of Assistant Public Prosecutor by order dated 2.8.2000 in order to enable him to join as Civil Judge [JD] and JMFC, but he was not confirmed and his services were terminated by the Government. It is pointed out that even though no instruction was given by the Secretary or any officer of the Legal Department, the petitioner made a mis-representation to the Collector, on the basis of which the Collector, Surat passed an order dated 15.12.2003 giving charge of 5th Joint Court and Juvenile Court to the petitioner as Assistant Public Prosecutor in place of Mr. H.D. Virani. However, it seems that the said Mr. Virani made a representation to the Legal Department. The District Collector,

therefore, informed the petitioner by letter dated 20.12.2003 [page 43, Annexure 'H'] that after getting appropriate instructions from the State Government, the charge from Mr. Virani will be taken, and after accepting such charge, the petitioner will be treated to have been resumed on his duty. The petitioner was also informed by the District Collector, by his letter dated 7.1.2004 [Annexure 'I', PAGE 44] that till further instructions are given by the Legal Department, he cannot be allowed to resume his duty as Assistant Public Prosecutor. It also appears from the record that the District Collector, by his letter dated 12.1.2004, [annexure 'J' page 45] called for explanation from the petitioner within two days for making a false statement in his letter dated 15.12.2003 to the effect that the Legal Department has permitted him to resume his duty as Assistant Public Prosecutor whereas no such instruction was given by the Legal Department and in reply thereto, the petitioner has also tendered apology by stating that there was some typing error. The said explanation is finding place at Annexure 'K' page 46. Subsequently, by the impugned orders, the petitioner's request for lien on the post of Assistant Public Prosecutor was turned down.

However, before the impugned orders were passed, the petitioner approached this Court by filing Special Civil Application No. 4428 of 2004, which, by order dated 16.4.2004, was dismissed as withdrawn. The petitioner has thereafter filed this petition challenging the impugned orders.

8. As regards the contention of Ms. Pahwa that the petitioner was promoted from the post of Assistant Public Prosecutor to the post of Civil Judge [JD] and JMFC and that as he is not confirmed on the said post, his lien on the original post of

Assistant Public Prosecutor continues in view of resolution dated 6.12.1997, [annexure F/2, paged 35-37], it is required to be noted that the said resolution provides that if any government servant or panchayat servant, by way of direct recruitment, is appointed on the higher post through GPSC or through centralized recruitment scheme or through any other recognized procedure, till such time the employee is confirmed in the higher post, his lien on the original post would continue. In the instant case, it cannot be said that the petitioner was appointed on a higher post either in the state service or in the panchayat service. Therefore, there is no question of either retention or suspension of his lien. Learned advocate Ms. Sangita Pahwa strongly relied upon Rules 22 and 23 of the Gujarat Civil Services [General Conditions of Services] Rules, 2002. The said rule reads as under:-

> "22. **Retention of lien**: Unless his lien is suspended under rule 23 or transferred under rule 26, a Government employee holding substantively a permanent post retains a lien on that post:-
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> (a). while performing the duties of that post;
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> (b). while on foreign service or holding a temporary post, or officiating in another post, or holding a post the pay of which is charged to works or contingencies;
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> (c). during joining time on transfer to another post on lower pay, in which case lien is transferred to the new post from the date on which he is relieved of his duties, in the old post;
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> (d). while on leave; and,
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> (e). while under suspension."

23. Suspension of a lien: (1). A competent authority shall suspend the lien of a Government employee on a permanent post which he holds substantively if he is appointed in a substantive capacity:

(a). to a tenure post, or

(b). provisionally to a post on which another Government employee would hold lien had his lien not been suspended under this sub-rule.

(2). A competent authority may, at its option, suspend the lien of a Government employee on a permanent post which he holds substantively if he is deputed out of India or transferred to foreign service or in circumstances not covered by sub-rule (1) of this rule is transferred in an officiating capacity to a post in another cadre, and if any of these cases there is reason to believe that he will remain absent from the post on which he holds a lien for a period of not less than three years.

Note: When it is known that a Government employee on transfer to a post outside his cadre is due to retire on superannuation within three years of his transfer, his lien on his cadre post cannot be suspended.

(3). Notwithstanding anything contained in sub-rule (1) or (2) of this rule, a Government employee's lien on a tenure post may in no circumstances be suspended. If he is appointed substantively to another permanent post, his lien on the tenure post

must be terminated.

(4). If a Government employee's lien on the post including a post in a selection grade of a cadre is suspended undersub-rule (1) or (2) of this rule, the post may be filled substantively, and the Government employee appointed to hold it substantively shall acquire a lien on it; provided that the arrangements shall be reversed as soon as the suspended lien revives.

Note: When a post is filled substantively under this sub-rule, the appointment will be termed as provisional appointment, the Government employee appointed will hold a provisional lien on the post; and that lien will be liable to suspension under sub-rule (1) but not under sub-rule (2) of this rule.

(5). A Government employee's lien which has been suspended under sub-rule (1) of this rule shall revive as soon as he ceases to hold a lien on a post of the nature specified in clause (a) or (b) of sub-rule (1).

(6). A Government employee's lien which has been suspended under sub-rule (2) of this rule shall revive as soon as he ceases to be on deputation out of India or on foreign service or to hold a post in another cadre, provided that suspended lien shall not revive because the Government employee takes leave; if there is reason to believe that he

will, on return from leave, continue to be on deputation out of India or on foreign service or to hold a post in another cadre and the total period of absence on duty will not fall short of three years or that he will hold substantively a post of the nature specified in clause (a) or (b) of sub-rule (1).

Instruction: Under the existing provisions of this rule, it is possible for more than one person to be appointed in a provisional substantive capacity against a single post. The operation of this rule should, however, be restricted so as to permit only one provisional substantive appointment against one post. Accordingly, the lien acquired by a Government employee on his appointment in a provisionally substantive capacity under sub-rule (4) of this rule, should not be suspended if he is deputed out of India or is transferred to a post of the nature specified in sub-rule (2) of this rule. “

9. In the affidavit in reply, it is stated in paragraph 6 that the petitioner has made a false statement before the District Collector for obtaining posting order from the District Collector. It is further stated therein that the provisions of circular dated 6.12.1997 upon which the petitioner was relying was not applicable, and the petitioner has no right of lien on the post of Assistant Public Prosecutor. It is required to be noted that in this case, the petitioner has misrepresented his case before the District Magistrate in his letter dated 15.12.2003 about instructions of Legal Secretary, and on that basis, the District

Collector passed an order in his favour giving him posting as Additional Public Prosecutor. Ultimately, it was found that no such instruction was given by the Legal Department and ultimately, the District Magistrate suspended the said order. Ultimately, after calling for the explanation of the petitioner, the Government took the impugned decision. Considering the aforesaid facts of the case, this is not a case in which this Court would like to interfere with the decision in its extraordinary jurisdiction under Article 226 of the Constitution.

10. Even otherwise, in my view, the petitioner, after getting his appointment as Civil Judge [JD] and JMFC was not entitled to have his lien on the original post of Assistant Public Prosecutor. The appointment of the petitioner as Civil Judge [JD] and JMFC is a substantive appointment in judicial service. On the recommendation of the High Court [in it's administrative side] his services were not continued as the High Court was of the opinion that he has not completed his probation period satisfactorily. The appointment of the petitioner as Civil Judge [JD] and JMFC cannot be said to be a substantive appointment in the state service or panchayat service.

11. Mr. Desai, learned Assistant Government Pleader submitted that the petitioner is not entitled to have the benefit of G.R. Dated 6.12.1997 as it cannot be said either he was appointed to a higher post in State or Panchayat service, or promoted from a lower post to a higher post in the State or Panchayat service.

12. It is also required to be noted that so far as judicial service is concerned, it is a distinct service. In the case of R.M. GAJJAR vs. STATE reported in 1977 GLR 738, which is a Full Bench

decision, this Court has held as under, in paragraph 9:-

> “9. One more decision which concludes this line of decisions in Baldev Raj v. Punjab & Haryana High Court, A.I.R. 1976 SC 2490, where their Lordships in terms held at page 2496 that the inner significance of the constitutional provisions relating to the subordinate judiciary was that in this context of recommendation of disciplinary action of the High Court in respect of judicial officers they should always be accepted by the Governor and it was inconceivable that without reference to the High Court, the Governor would pass an order which had not been earlier recommended by the High Court contrary to the contemplation in the Constitution. Even regarding the recommendation of the Public Service Commission where it is necessary under Article 320 (3) (c) in respect of judicial officers, unlike the case in our State where the 1960 regulations did not provide the necessity of such recommendation for judicial officers, Their Lordships pointed out that on a parity of decisions in Pradyat Kumar Bose v. The Hon'ble the Chief Justice of Calcutta High Court, A.I.R. 1956 SC 285, the advice should be of no other authority than the High Court in the matter of judicial officers. This was the plain implication of Article 235, as judicial officers were not serving under the State Government. .... “

13. Therefore, it is required to be noted that the Full Bench, in the aforesaid judgment, has found that the judicial officers are not

serving under the State Government. The said judgment of the Full Bench was carried in appeal before the Honourable Supreme Court, and the Hon'ble Supreme Court, by its judgment reported in AIR 1992 SC 2000, has confirmed the view taken by the Full Bench. In my view, therefore, judicial service is an absolutely distinct service altogether, and considering this aspect of the matter also, it cannot be said that the petitioner is entitled to have lien on his original post of Assistant Public Prosecutor. In my view, since the petitioner was a judicial officer, his services as a judicial officer should be treated as a distinct service, and in this view of the matter, the petitioner is not entitled to have lien on his original post of Assistant Public Prosecutor, and the petitioner cannot get benefit of G.R. Dated 6.12.1987.

14. The petitioner was relieved from the post of Assistant Public Prosecutor in order to facilitate him to join the judicial service. Under the circumstances, it cannot be said that the petitioner is entitled to retain his lien in view of rule 22 which is referred to earlier. Even otherwise, as stated earlier, the appointment of the petitioner as Civil Judge [JD] and JMFC is a distinct and separate appointment in judicial service. Moreover, the petitioner, even though in the past had rendered his services as Assistant Public Prosecutor, by making mis-representation and incorrect statement has obtained an order of posting him as Assistant Public Prosecutor from the District Collector after his services as Civil Judge [JD] and JMFC were terminated. Even this conduct itself dis-entitle him to claim any relief in a petition under Article 226. Considering these aspects of the matter, I do not find any substance in the petition.

15. Having heard the learned advocate for the petitioner and the learned Assistant Government Pleader, and having perused the records, I am of the considered opinion that the claim of the petitioner that he has lien on the post of Assistant Public Prosecutor, and is, therefore, entitled to continue as such, has absolutely no basis. I do not find any substance in this petition, and the same deserves to be rejected. Hence rejected. Notice is discharged. No order as to costs.

[P. B. MAJMUDAR, J.]

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